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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 POINT RUSTON, LLC; et al.,

12 Plaintiffs,

13 v.

14 PACIFIC NORTHWEST REGIONAL
15 COUCIL OF THE UNITED
16 BROTHERHOOD OF CARPENTERS
17 AND JOINERS OF AMERICA, et al.,

18 Defendants.

CASE NO. C09-5232BHS

ORDER DENYING
DEFENDANTS' MOTIONS
TO COMPEL

19 This matter comes before the Court on Defendants' motions to compel, Dkt. 97
20 and Dkt. 114. The Court has considered the pleadings filed in support of and in
21 opposition to the motions and the remainder of the file and hereby denies the motions as
22 discussed herein.

23 **I. PROCEDURAL HISTORY**

24 On October 28, 2009, Defendants filed a motion to compel documents (set one).
25 Dkt. 97. On November 5, 2009, Plaintiffs filed their response (Dkt. 104) and on
26 November 13, 2009, Defendants replied (Dkt. 110). Also on November 13, 2009,
27 Defendants filed a motion to compel Plaintiffs to produce an index for the documents
28 produced and a complete privilege log. Dkt. 114. On November 25, 2009, Plaintiffs

1 responded to this motion for an index and privilege log (Dkt. 125), and on December 4,
2 2009, Defendants replied (Dkt. 127).

3 II. DISCUSSION

4 The Court finds these motions interrelated and, therefore, addresses them together.
5 As an initial matter, the Court notes that it is unfortunate the parties could not resolve
6 these issues without the Court's aid.

7 A. Possession, Custody, or Control (Dkt. 97)

8 Federal Rule of Civil Procedure 34(a)(1) permits a party to "serve on any other
9 party a request [for documents] within the scope of Rule 26(b) . . . [that are] in the
10 responding party's *possession, custody, or control*." The rule is explicit that producing
11 documents that are simply in the responding party's "possession" is insufficient. *Id.*

12 With respect to the discovery request at issue, Plaintiffs confirmed by letter "dated
13 October 20, 2009, . . . that they would be producing 'responsive, locatable, non-privileged
14 documents *in their possession*.'" Dkt. 105, Declaration of Richard C. Hunt (Hunt Decl.) ¶
15 7 (emphasis added) (citation omitted). Defendants, unsatisfied with this confirmation,
16 demanded that Plaintiffs produce or represent that they have produced "all responsive
17 documents within [their] '*possession, custody or control*.'" Dkt. 97 at 3; *see also* Hunt
18 Decl. ¶ 5.

19 Defendants appear to be asking Plaintiffs to simply comply or represent they have
20 complied with the rules of civil procedure. However, Plaintiffs have already represented
21 as much. Plaintiffs have stated that, "other than . . . privileged or confidential documents,
22 [Plaintiffs have] produced all responsive documents they could locate after a reasonable
23 and good faith search. In the event additional responsive documents are located,
24 [P]laintiffs will supplement their responses at that time." *See* Hunt Decl. ¶ 11; *see also*
25 Dkt. 114 at 6 n. 1 (Plaintiffs noting that Defendants have not been deprived of any
26 discovery for which they are entitled). These statements are sufficient to satisfy
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1 Defendants' need for Plaintiffs to represent they have complied with and will continue to
2 comply with the federal rules of civil procedure.

3 Additionally, the federal rules of civil procedure provide Defendants with adequate
4 tools for resolving this type of conflict should the need arise. First, Fed. R. Civ. P.
5 37(c)(1) provides:

6 If a party fails to provide information . . . as required by Rule [26(e)],
7 the party is not allowed to use that information . . . to supply evidence on a
8 motion, at a hearing, or at a trial, unless the failure was substantially
9 justified or is harmless.

10 Because the Court has heard this instant motion, it is unlikely that any later
11 showing that Plaintiffs failed to properly disclose documents that were in their
12 possession, custody, or control will be found "substantially justified" under Rule
13 37(c)(1). Second, Fed. R. Civ. P. 11 also provides Defendants with a tool for
14 sanctions, when necessary.

15 Therefore, the Court denies Defendants' motion to compel on this issue.

16 **B. Index for Produced Documents (Dkt. 114)**

17 Pursuant to Federal Rules of Civil Procedure 34 and 37, Defendants
18 move the Court for an order 1) requiring Plaintiffs to provide an index for
19 the approximately 6,237 documents produced in response to Defendant
20 Jimmy Matta's Requests for Production of Documents or to categorize them
21 to correspond to each document production request; 2) requiring Plaintiffs
22 to provide a complete privilege log; and 3) requiring Plaintiffs to amend
23 their responses to Defendant Jimmy Matta's Requests for Production of
24 Documents to indicate the requests for which Plaintiffs have produced
25 documents.

26 Dkt. 114 at 1.

27 Pursuant to the federal rules of civil procedure, "a party must produce
28 documents *as they are kept* in the usual course of business *or* must *organize and*
label them to correspond to the categories in the request." Fed. R. Civ. P.
34(b)(2)(E)(i). This rule gives the producing party an option to produce documents
as kept or to organize the documents in a meaningful manner.

Here, Defendants assert that the documents, Bates numbers 00001-06237,
were produced in two boxes with no index or table of contents and that nothing

1 indicated which documents corresponded to which category of request. Dkt. 115,
2 Declaration of Daniel M. Shanley (Shanley Decl.) ¶¶ 5, 6. To resolve this issue, it
3 appears Plaintiffs, subsequent to the filing of the instant motion, provided “an
4 index of the documents produced, identified by Bates number ranges, showing
5 where documents are maintained, the identity of the custodian of the documents
6 and the sources of the documents.” Dkt. 126, Hunt Decl. ¶ 7. The Court has
7 reviewed this index. Dkt. 128, Shanley Decl., Ex. 4. The Court finds that this
8 document appears to satisfy the obligations of Plaintiffs pursuant to Fed. R. Civ. P.
9 34(b)(2)(E)(i).

10 Therefore, the Court denies Defendants’ motion to compel on this issue.

11 **C. Conclusion**


12 It appears from the parties’ recent motions that they are not fully
13 cooperating with one another during this discovery process. The parties are,
14 moreover, expected to resolve such initial discovery disputes without
15 unnecessarily resorting to Court intervention. The parties are urged to resolve
16 future discovery disputes, if possible, before making application to the Court for
17 relief.

18 **III. ORDER**

19 Therefore, it is hereby

20 **ORDERED** that Defendants’ motions to compel are **DENIED**.

21 DATED this 17th day of December, 2009.

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25 BENJAMIN H. SETTLE
26 United States District Judge
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